VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D187/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building, credibility of witnesses, expert evidence , defective work, time for completion in absence of contractual provision, variations, failure to comply with s31 of the *Domestic Building Contracts Act* 1995, costs, referral to the Director of Consumer Affairs.

APPLICANTS	Sam Choueiri, Rawad Choueiri
RESPONDENT	Ramil Amirikhas T/as Home Renovation Group
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	23 – 24 May 2007
DATE OF ORDER	19 June 2007
CITATION	Choueiri v Home Renovation Group (Domestic Building) [2007] VCAT 1062

ORDER

1 The Respondent must pay the Applicants $5,200.00 forthwith.

2 The Applicants must make the cabinets and benches ("cabinets") provided by the Respondent available for collection by the Respondent at a mutually convenient time before 17 July 2007. There is leave to apply regarding collection of the cabinets. Should the Respondent fail to collect the cabinets by 17 July 2007 the Applicants may dispose of the cabinets as they see fit.

3 There is no order as to costs.

4 The Principal Registrar is directed to refer this decision to the Director of Consumer Affairs.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicants	Mr T. Guthridge of Counsel
For the Respondent	Ms E. Ruddle of Counsel

REASONS

1 This application concerns a claim by the Applicants ("the Owners") against the Respondent ("the Builder") for the construction and installation of a kitchen at their home at 2 Clifton Grove, Coburg. The terms of the contract between the Owners and the Builder are far from clear because, contrary to the Builder's obligations pursuant to s31 of the *Domestic Building Contracts Act* 1995 ("DBC Act"), he entered into a major domestic building contract which did not set out in full all terms of the contract in writing. The attention of all parties is drawn to the definition of major domestic building contracts in s3 of the DBC Act:

> "A domestic building contract in which the contract price for the carrying out of domestic building work is more than $5,000.00 (or any higher amount fixed by the regulations)".

2 The Owners put into evidence three quotations on the Builder's letterhead. It is not clear whether all three were provided to the Owners at or about the dates they bore, however the first one was dated '02/10/2006' and both parties agree that it was received by the Owners. It provided that the Builder would supply the Owners with various cupboards, a sink and tap, and an island cupboard for $7,657.00, and acknowledged $4,000.00 had been paid in two instalments: $1,000.00 on 2 October and $3,000.00 on 6 October 2006.

3 The second quotation dated 23 November 2006 contained similar items but included an additional cupboard and bench top for $670.00 being a total of $8,327.00. The third quotation dated 3 January 2007 reduced the thickness of the double-sided melamine used in the kitchen carcass from 18mm to 16mm, and deleted the middle island cupboard and the corner glass cabined [sic] for a total of $6,940.00. By this date the Owners had paid $5,600.00. If calculating from the third quotation, all but $1,340.00 had been paid.

4 On or about "01/002/2007" the Builder sent the Owners' solicitors a document entitled "work to be completed". The point of similarity between this document and the quotation of 3 January 2007 is that the balance of $1,340.00 was the same. The Builder also tendered three different floor-plan sketches, none of which the Owners admitted receiving before the proceeding was commenced.

5 The Owners' claim against the Builder is described on page 6 of the document "Amended Further and Better Particulars to Points of Claim". It is actually points of claim amended for the third time. The claim seeks repayment of $5,600.00, $660.00 for the cost of removal of the kitchen, partially installed by the Respondent and repair of timber flooring; $500.00 for food purchased over 6 months while the kitchen was not installed and $1,645.00 legal fees incurred by way of "resolving dispute prior to commencing proceedings at VCAT".

CREDIBILITY OF THE WITNESSES

6 Evidence as to fact was given by the Second Applicant Mrs Rawad Choueiri and her son George Choueiri, and by the builder. Mr George Choueiri gave clear, concise evidence and I have no reason to doubt his truthfulness or accuracy.

7 Mrs Choueiri appeared, to some degree, over-whelmed by the dispute. It is also noted with grave concern that Mrs Choueiri stated from the bar table that the kitchen had been removed the week before the hearing. There can have been no mistake about when the hearing was to take place as the parties attended the Tribunal and the order for hearing was made on 9 May 2007. It is extraordinary that a party would destroy evidence at this stage.

8 The Builder's evidence was not believable. There were a number of instances but I provide two examples. The first was with respect to kick-rails. The kick-rails that had been placed at the bottom of the cupboards were white melamine-coated particle board. The Builder first said that these were temporary and would be replaced.

9 On the second day of the hearing I asked him why he would replace a set of kick-rails. He then said they were not temporary, but would be veneered to match the cupboards. In response to a further question about veneer over melamine, he said that it was because melamine is water-resistant. He was then asked if it is also glue-resistant. His response was "Yes it is, rather, no, sorry". The Builder's manner of speaking made it apparent that he had realised his evidence contradicted itself, and changed it to suit his purposes.

10 The second example concerned finish on cupboard doors. Both parties agreed the finish on the cupboard doors is unacceptable. The parties agree that when the doors were delivered to site the lacquer used on them was still tacky and some doors stuck together.

11 They also agree there is bubbling in the clear finish, for which the Builder seeks to blame the Owners. He said Mrs Choueiri repeatedly insisted that he bring the doors and install them, so he did, before they had time to cure. He said the un-named estapol or lacquer-type product he used took twenty-four hours to reach touch-dry and two weeks to "cure" properly so that the doors would no longer be vulnerable to damage.

12 The Builder said he took the doors to the Owners' home on 13 December 2006. He said he made fourteen doors, and fixed twelve, taking two back to his workshop with him. Mr Guthridge of Counsel for the Owners asked, in cross-examination, what happened to the surface of the other two doors. The Builder said he put them in his shed and they bubbled. Mr Guthridge's response was : "So any bubbling would have occurred even if the doors were left in your workshop?" The Builder responded that the bubbling was due to the time the doors were in his car, travelling to site on a hot day. In further response to Mr Guthridge's question about whether heat caused the damage, he said "I'm not an expert, I don't know, I can't say". Again, the

Builder demonstrated willingness to say or assert anything which he thought might support his case.

13 Regardless of concerns about Mrs Chouieri's evidence caused by removal of the kitchen shortly before the hearing, whenever there is a contradiction between the evidence of the Builder and that of Mrs Choueiri or Mr George Choueiri, the evidence for the Owners is preferred.

QUALITY OF THE WORK

Representations by the Builder

14 Mrs Choueiri said the Builder told her he could do various jobs – kitchens, plumbing, electrical and gardening. Her evidence is accepted that he said he could do her kitchen and that it would take four or five weeks.

15 It is noted that the Owners knew the Builder was not a full-time tradesman. They met him through their son, George, with whom he worked at Optus. Mr George Choueiri said the Builder said "trust me, it will come out beautiful" and would be completed in about five weeks. I accept Mr Chouieri's recollection of the conversation.

The required standard

16 In the absence of an agreed standard, the standard of workmanship is imposed by law and by s8 of the *Domestic Building Contracts Act* 1995 which is:

> Implied warranties concerning all domestic building work
>
> The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—
>
> (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
>
> (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
>
> (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act;
>
> (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
>
> (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter,

extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

Alleged defects

17 I was not assisted by the Owners removing the partially completed kitchen. However, they have provided numerous photographs and a video of the kitchen. In general, the standard of finish as indicated by the photographs, the video and the door tendered by the Builder, was poor. There were numerous chips on the edges of the melamine carcass and on cut edges within the carcass itself.

18 The Builder tendered a cupboard door in evidence which appears to have been competently constructed but which was finished extremely poorly. There are patches where it might have touched something before it was dry, "orange peel" bubbling, a small bare or sanded patch on the front of the door, sanding or brush marks across the grain and apparent contamination of the lacquer or estapol with a white material on the inside of the door. It is noted that this is the door the Builder chose to put into evidence. It is unclear how he thought it would assist his defence.

19 I gained limited assistance from the evidence of Mr Simon Tsakouridis, cabinetmaker who gave evidence on behalf of the Owners. His evidence was unclear, and enthusiastic rather than careful and supported by reason. In the video he seemed to be in danger of causing damage rather than pointing it out. He did not go through each item complained of by the Owners and say whether, and why, it failed to reach standards of reasonable workmanship.

20 Surprisingly, given that the Owners were legally represented, Mr Tsakouridis' report was not in accordance with Practice Note VCAT 2 – Expert Evidence. He has been engaged by the Owners to replace the kitchen supplied by the Builder, therefore, given both his conflict of interest and inexperience as an expert witness, I have not relied upon his evidence regarding whether replacement is necessary. I accept his evidence that he is an experienced cabinet-maker of many years standing.

21 In examination-in-chief the Builder denied having done any of the damage which still exists. He also claimed the cost of rectification by him of damage allegedly done by others, in his set-off. If he had done so, the finished product should no longer have been damaged after the alleged repairs. The photographs and video showed that there was incomplete or

defective work that he had clearly not rectified. The Builder's evidence regarding this aspect is rejected.

22 The following defects were alleged at paragraph 13 of the "Amended Further and Better Particulars of Points of Claim":

A "The melamine was cut in a manner that caused chips to the edges of the melamine".

23 This item is taken to mean that the cut edges of sheets of board factory-laminated with melamine have been poorly cut giving a result that does not display a standard of reasonable workmanship. Photographs of the work support this conclusion. Those edges referred to appear rough, and in places, ragged. This aspect of the work done is sufficient to justify the conclusion that the work is of such a poor standard that the Owners are justified in insisting on removal and replacement of the kitchen rather than being allowed an amount for repair.

B "The joins on the benches were not finished and there were gaps between the melamine"

24 It is assumed that the reference to "melamine" is a reference to the laminate used on the bench. There is a cut piece of bench at the "glass cabinet" end of the kitchen with a gap to the remainder of the bench. The gap appears to be approximately 1mm wide. Mr Tsakouridis' evidence is accepted that the parts of the bench are just butted together. They have not been silicon-sealed and joined with toggle-bolt bench joiners. It is accepted that the gap would be vulnerable to water entry, which could cause further damage to the bench and the laminate. It is accepted that the bench is not of a reasonable standard of workmanship and that it should be replaced.

"C The edges of the benchtops were not rounded but left square".

25 The Owners' complaint is that unlike the front of the bench-tops, which finished in a bull-nose, the end of the bench top near the glass cabinet was square and unlaminated and the edges of the bench on the island bench were square and unlaminated. Mrs Choueiri said that the end should have been bull-nosed also. I accept her evidence, and note that the bench has to be replaced to achieve this result.

"D The laminate was of an inferior nature being thin and "ironed" on so that the melamine was peeling off".

26 There was no evidence that the melamine edge-stripping itself was inferior. Mr Tsakouridis said that edge stripping comes pre-glued, as the sample was, or unglued. He said he prefers the latter, but he did not provide evidence that the former product is inferior or that the Builder was at fault in using it. Mr Tsakouridis did, however, give evidence that the melamine edge strips he inspected had not been fixed properly and that when he tapped it he could hear hollow spots. His evidence is accepted in this regard, and is consistent with a number of photographs that showed the edge-strip had chipped or peeled off.

27 The Respondent gave evidence that the Owners required him to deliver the carcass to site before the room was ready for the kitchen to be installed, and that when he returned to site to install the kitchen, the carcass had been damaged by others. Mrs Choueiri denied that the carcass had been "knocked around by others", and I prefer her evidence.

"E The hinges on the doors were incorrectly positioned so that they would not open properly. The hinges are incorrectly placed and will cause the cupboard doors to rub together"; and

"F The hinges are incorrectly placed too far down and exceed the acceptable level".

28 Mr Tsakouridis gave evidence that the hinges should not be placed too far from the bottom or top of the door, and said that the hinge positions were not in accordance with standards of reasonable workmanship. However his evidence was unsupported by an Australian Standard or even a cogent reason. The Owners have failed to prove these alleged faults.

"H The "kick rail" on the bottom of the cupboards had large gaps between it and the floor".

29 The Owners' photographs 12, 13, 14, 16, 17 and 26 showed two corner views of the kick rail. Assuming a person standing at the kitchen sink is looking west, one is in the south east corner of the kitchen and the other in the south-west. At the south-west corner, there was a gap of about 10mm between the meeting pieces of kick-rail, which the Builder did not explain. At the south-east corner, the kick rail had been fixed at the adjacent north-east corner (the end of the pantry) but sagged off the line of the floor boards. The Builder's evidence is accepted that the kick-rail was resting on the yellow-toungue board which supports the polished floor. His further evidence, that he was going to remove and re-fix the kick-rails, was illogical and hard to believe in circumstances where the end of the kick-rail had been fastened. It is accepted that the kick-rail was not attached in accordance with standards of reasonable workmanship. It might have been capable of repair – this was not clear.

"I The island bench was erected on wheels that were too high and too close together so that the island bench was unsafe and would tip over".

30 The Builder admitted this fault but said he bought the wheels for the island bench as originally planned, which was bigger than the one constructed. He claimed the wheels would have been acceptable on the original bench. He said the wheels were temporary for the bench as built and he was going to replace them. The Builder's evidence on this matter is not accepted as so unlikely as to be unbelievable.

"K The appearance of the melamine was faded, chipped and looked old".

31 The Owners' photographs show numerous chips, but there was no evidence that the white melamine was "faded" or "looked old".

"L The cupboard doors that were installed were not of solid Tasmanian Oak but were constructed of a veneer".

32 The quotation of 2 October 2006 called for:

> Colonial doors made from aged Tasmanian Oak (not plantation timber) Arched top or straight, (the style will be selected after the agreement of the sale) made to size of 400mm.

The description is identical in the quotations dated 23 November 2006 and 3 January 2007.

33 In contrast in the document of "01/002/2007" the entry is:

> Colonial doors Tasmanian oak frame with 3mm MDF veneered middle (already stained and customer has selected the colour) need to be revarnished and installed.

34 Mrs Choueiri said that she chose solid oak doors. She said the Builder showed her a sample of the doors eventually provided, but it was to enable her to chose the colour, not to show her the materials.

35 She said the Builder showed her a book of samples, including two-pack paint finish, vinyl wrap and solid wood including Tasmanian Oak, and that she chose solid Tasmanian Oak. She also chose an arched top for the inset, but the doors delivered had a square top. Mr George Choueiri also recalled that the Builder said the doors would be solid Tasmanian Oak.

36 Under cross-examination Mrs Choueiri stated that at the time the doors were taken back to the workshop by the Builder, she objected to the style of the doors provided, and said she wanted them re-done. Her evidence is accepted.

37 The Builder said Mrs Choueiri wanted solid timber doors, but opted for a solid timber frame with veneered MDF centre to save money.

38 On balance, the description of the doors in the quote of 2/10/2006 supports the Owners' evidence. There is no mention of veneer in connection with the doors, whereas there is with respect to the panels on the "middle island". The change of description in the "work to be completed" document of "01/002/2007" emphasises that the doors did not match the earlier description.

39 The evidence of Mrs Choueiri and Mr George Choueiri is preferred. It is found that the Builder breached the contract by supplying the doors with veneered MDF centres

"M The cupboard doors were not square and the varnish was poorly applied so that it "bubbled".

40 No evidence has been given that the doors were not square, however it is noted that the only door not in the possession of the Builder is the door he

tendered in evidence, which appears well made. However, as noted above, is also extraordinarily badly finished.

41 As mentioned above under "Credibility", it is not accepted that anyone but the Builder bears responsibility for the poor finish of the doors.

42 I find that the only items of value that the Owners have obtained by virtue of this contract are the sink and tap. The only estimate of the cost of these items is the evidence given by the Builder that they were $280.00 for the sink and $120.00 for the tap, a total of $400.00. The Builder's evidence is accepted. $400.00 is deducted from the amount payable by the Builder to the Owners.

FLOOR ALLEGED TO HAVE BEEN CUT BY THE BUILDER

43 On page 6 of the "Amended Further and Better Particulars to Points of Claim", beneath the particulars to paragraph 22, is a section headed "Damages" "(6)", is:

> "$660 which is the cost for the removal of the part installed kitchen and repairs of the flooring".

44 The Owners failed to give evidence that the floor had been cut by the Builder. The only evidence is the Builder's - that the floor-layer did not complete the polished floorboards under the area where the kitchen would be placed, to save money. His evidence is therefore accepted. There is no allowance for this item.

COST OF REMOVAL OF THE KITCHEN

45 The cost of removal of the kitchen and reinstatement of the floor appears to have been derived from a document entitled "tax invoice/statement" from Moreland Floor Service, which accompanied the amended points of claim of 10 May 2007. It stated that the cost of removal and disposal of the kitchen and repair and replacement of parquetry timber floor complete with gloss finish would be $660.00, however no evidence was given regarding this document.

46 It is accepted that the kitchen supplied by the Builder has now been removed, but evidence of the cost, if any, of doing so was not provided by the Owners. There is no allowance for this item.

TIME

47 The Owners alleged that the Builder undertook to install the kitchen within five weeks. Evidence of the Second Applicant, Mrs Choueiri, and of her son, Mr George Choueiri is accepted that he did make such an undertaking, but there was no claim for an amount arising out of his failure to fulfil this obligation until Mr Guthridge of Counsel for the Owners said that his clients claimed 'about $2,000.00' for delay, embarrassment and inconvenience.

48 As Ms Ruddle of Counsel for the Builder submitted, the Owners did not provide or prove a basis upon which they would be entitled to such a sum. The Tribunal is not a court of pleadings, but the parties are entitled to know the case they face, particularly when the other is legally represented. I make no allowance for time, embarrassment or inconvenience.

FOOD

49 The Owners included a claim for $500.00 for food purchased over six months, but failed to provide any evidence that would justify an award of any amount for food.

SET OFF

50 The Builder filed his defence on the first day of the hearing. Although this was in breach of the Orders of 9 May 2007, it is noted that the defence was to the fourth iteration of the Points of Claim, which had been filed and served two days before the hearing commenced. The Builder said he undertook repair work necessitated by the damage caused by others and that he undertook certain variations. He said that in each instance he advised the Owners of the costs before doing the work and they did not agree to those costs, but he did the work anyway "as a gesture of good will".

51 As discussed above, the Builder's evidence regarding repair is not accepted. There is no physical evidence that any repairs were undertaken. There is no allowance for the "costs of constructing upper cupboards which were not required" – they were part of the items quoted on 2 October 2006 and they are in the Builder's possession.

52 There is no allowance for "cost of glass cabinet". Even if the Builder had supplied plans to the Owners, which was denied by them and is not accepted, the plans were insufficient to indicate how the "glass cabinet" should be constructed. I do not accept that it was a variation to the contract of 2 October 2006.

53 The Builder's claim for the cost of the first variation to the pantry is outrageous in circumstances where it was necessitated by his own design which would not work, because the corner doors would not have closed. Had the Builder properly drawn document R1 of 29 November 2006 this fault would have been immediately obvious.

54 I find that each of the items claimed by the Builder is a variation, within the meaning of sections 37 and 38 of the *Domestic Building Contracts Act* 1995. Under s37, where a builder seeks a variation, the builder is not entitled to payment for it unless the variation and the amount for it are agreed in writing. S38 deals with variations sought by owners. The Builder is still not entitled to payment unless the variation and the amount for it are agreed in writing, unless the variation would be worth less than 2% of the contract price. On the Builder's own evidence I am not satisfied that there were any variations agreed to by the Owners, because they refused to pay

for them before they were undertaken. In circumstances where the Builder knew this and went ahead anyway, he is not entitled to payment.

DAMAGES

55 I am satisfied that the only reasonable means of putting the Owners in the position they should have been in is to enable them to have a qualified cabinet-maker start the job from the beginning. They have sought repayment of the amount they paid the Builder, $5,600.00 and it is reasonable that they receive this sum, less the cost of the sink and tap that they wish to keep, being $400.00.

56 The Builder must pay the Owners $5,200.00 forthwith. The Owners must make the cabinets and benches ("cabinets") provided by the Builder available for collection by the Builder at a mutually convenient time before 17 July 2007. There is leave to apply regarding collection of the cabinets. Should the Builder fail to collect the cabinets by 17 July 2007 the Owners may dispose of the cabinets as they see fit.

COSTS

Costs before commencement of the proceeding

57 The Owners included a claim for $1,645.00 costs incurred before commencing the proceeding in their "Amended Further and Better particulars of Points of Claim". This claim was abandoned at the hearing.

Costs of the proceeding

58 Both parties sought their costs. The Applicants sought them on the basis that the proceeding was complex and that the Applicants' claim was strong. The proceeding was not particularly complex and the Respondent has succeeded in substantially reducing their claim for damages. The have failed to establish a basis upon which it is fair to depart from s109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides that each party is to bear their own costs. In particular I note that mere permission to be represented by a professional advocate is insufficient to justify an order for costs, and I am at a loss to understand why the Applicants filed four different versions of their points of claim. Surprisingly, no version of the points of claim made any reference to the DBC Act.

59 The Respondent also sought costs on the basis that he asserted the Applicants had failed to prove their case. His assertion was incorrect.

60 There is no order as to costs.

APPARENT BREACHES OF THE DBC ACT

61 The Builder is not a skilled cabinet-maker and should not hold himself out to the public as being so. He has entered a major domestic building contract when he is precluded from doing so by s29 of the DBC Act. He has

also failed to abide by s31 of the DBC Act. The Principal Registrar is directed to refer this decision to the Director of Consumer Affairs.

SENIOR MEMBER M. LOTHIAN